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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TARAY TAQWAIN MORRIS, Defendant and Appellant.	B150749 (Super. Ct. No. TA102296)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary R. Hahn, Judge. Affirmed.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and G. Tracey Letteau, Deputy Attorney General, for Plaintiff and Respondent.

Taray Taqwain Morris appeals from the judgment entered following his convictions by jury of first degree murder (Pen. Code, § 187) with the special circumstance that the murder was committed during an attempted robbery (Pen. Code, § 190.2, subd. (a)(17)), and of attempted second degree robbery (Pen. Code, §§ 664, 211), with findings that, as to each offense, he personally and intentionally discharged a firearm that caused death and great bodily injury (Pen. Code, § 12022.53, subd. (d)), and personally used a firearm (Pen. Code, § 12022.5, subd. (a)(1)), and with an admission that he suffered two prior felony convictions (Pen. Code, § 667, subd. (d)). He was sentenced to prison for an unstayed term of life without the possibility of parole, plus 25 years to life.

In this case, we hold no reversible prosecutorial misconduct occurred when the prosecutor, during opening argument, commented that appellant was a convicted felon. We hold the trial court did not reversibly err by instructing on jury misconduct using CALJIC No. 17.41.1. Finally, we hold that appellant's sentence was neither cruel nor unusual punishment.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is not disputed, established that, according to Lorena Preciado, on October 14, 1999, Armando Gonzalez was driving a car in Compton. Preciado was the right front passenger. While the car was stopped, appellant crossed the street, walking past the front of the car. Gonzalez drove into a gas station at Atlantic and Alondra and parked. Preciado observed appellant in an alley near

the car. Appellant was talking with a woman. At some point, Gonzalez exited the car to make a telephone call while Preciado remained inside. Appellant approached Gonzalez. Gonzalez was about 12 feet from Preciado and talking on a public telephone.

Preciado was seated facing forward and the public telephone was behind her. Preciado turned and observed the following. Appellant was with Gonzalez. Appellant had something white wrapped around his right hand and was holding what looked like a piece of metal. Appellant pushed Gonzalez and, at the time, appellant's side was to Preciado. Preciado looked away.

Preciado then heard a gunshot.[1] Preciado looked "[t]owards the back" and observed Gonzalez run about 15 feet then fall. Preciado fled from her car. At some point, she heard three more gunshots.[2] Preciado last saw appellant "[w]hen he approached my window, car's window, he went back to [Gonzalez]."

According to Los Angeles District Attorney Investigator Norman Biehn, at about 12:35 p.m. on the above date, Biehn was driving his car and had stopped at a red light at the above mentioned intersection. Biehn heard a gunshot, looked in the direction of Gonzalez and appellant, and saw appellant accosting Gonzalez. Appellant was holding in his right hand a nickel- or chrome-plated gun. Appellant was attempting to put his left hand in Gonzalez's right front pants pocket and, while appellant attempted to do so,

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[1] Preciado testified appellant shot Gonzalez. Preciado then testified she did not "see when [appellant] shot [Gonzalez]," but "just heard."

[2] During direct examination, Preciado testified she did not know where she was when she heard the additional three shots. She later testified she did remember, and "[w]hen I heard one of them is when I got off [*sic*] the car, and I was walking towards the back of the gas station."

Gonzalez moved a few feet then collapsed. As Gonzalez fell, appellant went through the pockets of the unresisting Gonzalez.

Appellant stood, took five or six steps away from Gonzalez, then returned. Gonzalez, who was lying on the ground, defensively raised his arm. Appellant, about a foot or two away from Gonzalez, shot him three times in the chest. Appellant walked towards the alley and slowly trotted away. Biehn was about 75 to 100 feet from appellant at the time of the shootings. During the period Biehn observed appellant, it was primarily appellant's "right side and . . . rear side" which Biehn was able to see.

An autopsy revealed that Gonzalez had been shot twice in the stomach, once in the back, once on his left elbow, and twice on his left hand. Gonzalez died from multiple gunshot wounds.

On November 2, 1999, appellant took a woman's BMW and purse at gunpoint in Burbank. As appellant drove away, another car accompanied him. About 45 minutes later, a Los Angeles County Sheriff's deputy observed appellant drive the BMW and commit traffic violations. The deputy activated his patrol car's overhead lights and attempted to conduct a traffic stop, but appellant did not stop. A high speed pursuit ensued at the conclusion of which appellant collided with a telephone pole. Appellant was detained and a loaded stainless steel revolver was recovered from underneath the BMW's brake pedal.

Preciado identified appellant as the shooter from a photographic lineup containing six photographs, at a corporeal lineup, at appellant's preliminary hearing, and at trial.[3]

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[3] Preciado testified at trial that, before she testified at the preliminary hearing, she was "very upset at the sight" of appellant.

Biehn identified appellant as the shooter at a corporeal lineup.[4] A Los Angeles County senior criminalist assigned to firearms identification opined that two expended bullets, that is, one from the shooting scene, and one from Gonzalez's body, were fired from the revolver recovered from the BMW.

2. *Defense Evidence.*

Appellant presented mistaken identity and alibi defenses. Larry Horsley, appellant's brother, testified that at about 12:20 p.m. on October 14, 1999, Horsley observed appellant at home, where appellant was recovering from an accident. Norman Bougere, a friend of appellant's, testified he was with his "homeboys" at a house in Lynwood when Bougere called appellant and asked him to come to the house. About 15 minutes later, Bougere was walking with a "homeboy" in the alley near the above mentioned gas station. Bougere and his companion observed an angry, sweating, "unnormal" male pacing back and forth in the alley. The male was not appellant. Bougere believed the male was "Crip Crazy from Atlantic." Bougere and his companion left the area for about 15 to 20 minutes, returned, and saw police cars. Bougere did not tell the police what he had observed.

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[4] A couple of days after the shooting, Biehn was shown a photographic lineup but was unable to identify anyone. The corporeal lineup occurred later. Biehn's "lineup I.D." indicated he was not certain about his identification of appellant. Biehn's identification was based on appellant's "mannerisms, the way he walked, and his build." Biehn testified the shooter had on "an oversized shirt, a blue long sleeved shirt, dark levis or dark blue levis, and he was wearing what is referred to as a do rag. It was hanging down over the back of his head, covered the hole [*sic*] top of his head and hanging down the backside covering his ears and his neck." From Biehn's location, he obtained a "good look" at the shooter's build, movement, and clothing, but not the shooter's face. The court had appellant walk across the courtroom; Biehn testified that the way appellant walked was similar to the distinctive gait of the shooter.

A Compton police deputy was dispatched to the shooting scene and spoke with Biehn. The deputy testified that Biehn told the deputy that Biehn heard a shot, saw the suspect run back towards the victim and shoot the victim three times, then go through the victim's pockets.

CONTENTIONS

Appellant contends: (1) "[w]hen the prosecutor labeled appellant a 'convicted felon' in closing argument, he undermined the credibility of the defense and prejudiced the jury in an otherwise close case"; (2) "[t]he court erred by instructing the jury with CALJIC 17.41.1, which impedes free and open jury deliberations and discourages the historically accepted practice of jury nullification"; and (3) "[a]ppellant's sentence of life without possibility of parole for felony murder is cruel and unusual punishment[.]"

DISCUSSION

1. *No Reversible Prosecutorial Misconduct Occurred.*

a. *Pertinent Facts.*

During direct examination Bougere testified, without objection, that he had known appellant a "few years" and had "met him last time [appellant] was incarcerated." During cross-examination, Bougere testified, "I had met [appellant] after he had got out of jail. He was incarcerated, and I had met him." Appellant did not testify at trial.

The following occurred during the People's opening argument: "[The Prosecutor]: You heard the instructions, human being was killed, malice aforethought. [¶] Well, let me say this. When you take a gun from wherever you have it, you either put those bullets in, or if they are already there, you check to make sure they are there, you close that gun, you, according to Ms. Preciado, wrap that gun in something to hide it because you're standing on the boulevard at high noon or just after it, and you walk up to someone and rob them and kill them, that's murder. [¶] Let's talk a little bit about that. [¶] First off, what's this *convicted felon* doing with a gun anyway on the boulevard? Let's give him the benefit of the doubt. Let's say he's got some justifiable reason for having a gun even though the law said he can't. [¶] There's no evidence that the victim knew this man. All we have is the testimony that he got out to make a phone call."[5] (Italics added.) Appellant did not, during the People's opening argument, object to the prosecutor's above quoted comments.

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[5] The People's opening and closing arguments take up about 18 and 3 pages, respectively, of the reporter's transcript.

After the People's opening argument concluded, the court took a recess, the jury was excused, and the following occurred: "[Defense Counsel]: I'll make a motion for a mistrial. [¶] [The prosecutor] said, 'what is this convicted felon doing out there with a gun.' I don't believe there was any testimony or evidence about a convicted felon. [¶] The Court: That's true. [¶] [The Prosecutor]: Your Honor, his witness testified that he met the defendant after he got out of state prison. [¶] [Defense Counsel]: He said jail. [¶] [The Prosecutor]: I think he said jail. [¶] The Court: He said prison once. [¶] [Defense Counsel]: I don't think that's the same thing as telling the jury he was a convicted felon. [¶] The Court: It's denied. There was evidence that he met him after he got out of prison. [¶] I'll deny your motion for a mistrial. [¶] I'll instruct the jury if you want me to, or keep it quiet. [¶] [Defense Counsel]: There's no evidence he was a felon is fine."

The following then occurred: "[The Prosecutor]: That's not really the state of the evidence, though. I mean, he's testified this man -- he met him when he got out of prison. The reasonable inference is felons go to prison." The following later occurred: "The Court: . . . You think about if you want me to tell the jurors anything. [¶] [Defense Counsel]: Right."

After a recess, the court stated, "[w]e did check the transcripts out, and it was evidence [*sic*] that Mr. Morris had been incarcerated and in jail, but no evidence he was a felon. [¶] Do you want me to tell the jury that?" Appellant replied there was no evidence that appellant was a felon or had been in prison. Appellant again moved for a mistrial.

The court denied appellant's mistrial motion, stating, "There's no evidence of state prison. It does not necessarily mean he wasn't a felon. He was incarcerated and in jail. It could have been a felony or misdemeanor. I don't know. [¶] Do you want me to tell the jury that or not?" After further argument, the following occurred: "The Court: You want me to tell them we know he was incarcerated, he was in jail, there's no evidence that he was a felon at the time of this incident, or I won't say anything. [¶] [Defense Counsel]: I would just ask that you say there's no evidence before you that Mr. Morris is a felon. That's all." The prosecutor submitted the matter. At appellant's request, the court subsequently agreed to use the phrase "convicted felon."

Later, in the presence of the jury, the court stated, "I want to correct one thing [the prosecutor] said. There's no evidence that Mr. Morris was a convicted felon when this incident happened." Jury argument then continued.[6]

b. *Analysis.*

Appellant failed, during the prosecutor's opening argument, to pose a timely and specific objection that the prosecutor committed misconduct by commenting that appellant was a convicted felon. Nor did appellant then request a jury admonition, which would have cured any harm. Appellant waived any issue of prosecutorial misconduct pertaining to that comment. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Clark* (1993) 5 Cal.4th 950, 1016; *People v. Noguera* (1992) 4 Cal.4th 599, 638; *People v. Mincey* (1992) 2 Cal.4th 408, 471; *People v. Camacho* (1993) 19 Cal.App.4th 1737, 1745; *People v. Prysock* (1982) 127 Cal.App.3d 972, 997.)

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6 During the giving of jury instructions, the court, using CALJIC No. 1.02, instructed the jury that statements made by attorneys during trial were not evidence.

Moreover, there is no dispute that Bougere's unobjected to testimony concerning appellant's having been in "jail" and "incarcerated" provided evidence that appellant had been charged with a crime. Further, one meaning of the word "jail" is "prison,"[7] and one meaning of the word "incarcerate" is to "imprison."[8] The prosecutor was not obligated to believe that *Bougere* intended to convey meanings different than these. And it is indisputable that if appellant had been in prison, this evidenced he was a convicted felon. (Pen. Code, § 17, subd. (a).) The prosecutor's comment was fair comment based upon the evidence. (Cf. *People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.)

Further, to the extent it is arguable that the terms "jail" and "incarcerated" did not evidence that appellant was a convicted felon, we note the record at least suggests initial confusion on the part of the prosecutor and trial court as to whether Bougere had testified that appellant had gone to "prison"; this confusion provides evidence that, to the extent the challenged comment was erroneous, the error was inadvertent.[9] In any event, the record fails to demonstrate that the challenged comment violated due process or appellant's constitutional rights, or was so reprehensible or deceptive as to constitute prosecutorial misconduct. (Cf. *People v. Gionis, supra,* 9 Cal.4th at p. 1215; *People v. Meneley* (1972) 29 Cal.App.3d 41, 62.)

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7 (Webster's 3d New Internat. Dict. (1961) p. 1208.)

8 (Webster's 3d New Internat. Dict. (1961) p. 1141.)

9 We also note that the preconviction report prepared for a June 28, 2000 hearing reflects appellant was a convicted felon. The court and parties had access to that report prior to the March 14, 2001 commencement of trial, and prior to the prosecutor's April 5, 2001 comment during opening argument. Although it is conceivable that, during opening argument, the prosecutor used Bougere's testimony as an occasion to present facts arguably not in evidence, it is no less conceivable that any error in the challenged comment was the product of the prosecutor's inadvertent augmenting of Bougere's testimony by the prosecutor's knowledge of the contents of the report.

Finally, at appellant's request, the court, after the conclusion of the People's opening argument, told the jury that the court wanted to correct something the prosecutor had stated. The court then admonished the jury that "There's no evidence that Mr. Morris was a convicted felon when this incident happened." In light of the fact that that admonition cured any harm (cf. *People v. Prysock*, *supra*, 127 Cal.App.3d at p. 998), the fact that the jury is presumed to have followed the jury instructions, including CALJIC No. 1.02 (see fn. 6, *ante*) (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), and the strength of the evidence of appellant's guilt, no prejudicial error occurred. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)[10] An appellate court applies the abuse of discretion standard of review to any ruling on a motion for a mistrial. (*People v. Williams* (1997) 16 Cal.4th 153, 210.) The trial court did not abuse its discretion by denying appellant's mistrial motion. None of the cases cited by appellant, or his argument, compels a contrary conclusion.

2. *The Court Did Not Reversibly Err By Giving CALJIC No. 17.41.1.*

The court instructed on jury misconduct using CALJIC No. 17.41.1 (1998 new).[11] There is no need to decide whether the giving of the instruction was error. In the present

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[10] To the extent appellant claims the prosecutor committed misconduct by commenting that appellant illegally possessed a gun, appellant waived the issue by failing to object during the prosecutor's closing argument, and by failing to request a jury admonition. Appellant did not even raise that issue during his motion for mistrial. Moreover, there is no dispute that someone possessed a gun and shot the unresisting Gonzalez with it; nor is it disputed that no evidence was presented that the shooter lawfully possessed the gun. There was substantial evidence appellant was the shooter. The prosecutor's comment was a fair comment upon the evidence, and did not violate appellant's constitutional rights.

[11] CALJIC No. 17.41.1 (1998 new) reads: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses

case, there was no jury deadlock, there were no holdout jurors, and there was no report to the court of any juror refusing to follow the law. In short, there was no indication that the use of CALJIC No. 17.41.1 affected the verdict. Thus, any error in giving the instruction does not warrant reversal of the judgment. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1332-1336.)[12]

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an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

[12] The issue of whether the giving of CALJIC No. 17.41.1 is reversible error is pending before the Supreme Court in *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462, and *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000, S088909.

3. *Appellant's Sentence Was Neither Cruel Nor Unusual Punishment.*

a. *Pertinent Facts.*

The preconviction probation report prepared for a June 28, 2000 hearing reflects that appellant was born in November 1978, had one alias, and used the monikers "Lil Blacky" and "Trouble." The report reflects appellant's juvenile criminal history as follows. On June 13, 1991, appellant was arrested for receiving stolen property. The report reflects, "Petition date 10-10-91 sustained." Appellant was placed in camp. On July 4, 1991, appellant was arrested for vandalism with damage between $1,000 to $5,000, and receiving stolen property. The report reflects, "Petition date 8-27-91 sustained." Appellant was placed in camp.

On July 4, 1991, appellant was arrested for grand theft of a vehicle or vessel, taking a vehicle without the owner's consent, and attempted robbery. The report reflects, "Non-detained petition, petition date 10-10-91 sustained." Appellant was placed in camp. The report reflects that on "4-25-92," appellant was arrested for robbery. The report also reflects, "2-28-92 [*sic*] petitioned and detained."

The report reflects appellant's adult criminal history as follows. In May 1994, appellant was arrested for robbery (three counts), possession of a firearm by a felon or addict, possession of a controlled substance for sale, and assault with a firearm. In May 1995, appellant was convicted of robbery and assault with a firearm (case No. TA030360). He was sentenced to prison for seven years.

On November 3, 1999, appellant was arrested for carjacking. (This appears to relate to appellant's previously mentioned November 2, 1999 taking of a BMW at gunpoint.) In December 1999, in case No. GA041081, an information alleged that

offense along with Penal Code section 12021, subdivision (a)(1), 12022.53, subdivision (b), and 12025, subdivision (a)(1), enhancements. A violation of Penal Code section 2800.2, subdivision (a), was also alleged.

The report reflects there had been no disposition in that case. The report also reflects that appellant was involved in gang activity with the Kelly Park Crips. As of the date of the report, appellant was on parole, and a hold had been issued. Appellant's conduct while on parole was unsatisfactory. The probation officer stated that appellant "appears to be an habitual criminal, . . ."

The report listed as aggravating factors that appellant's prior convictions were increasing in seriousness; he had served a prior prison term; and he was on probation or parole when he committed the present offenses. The report did not list any mitigating factors, and recommended imprisonment for the "high-base term."

During the penalty phase of trial, the People presented evidence concerning the facts underlying appellant's 1995 convictions for robbery and assault with a firearm, and the facts underlying case No. GA041081, as well as testimony from a daughter of Gonzalez. Appellant presented evidence, inter alia, that, over his lifetime, he had received several head injuries. During at least two incidents, the injuries were to the frontal area of the brain "that controls emotion and impulses and inhibition of behavior, . . ." A stepfather frequently inflicted corporal punishment on appellant.

At the May 17, 2001 sentencing hearing, appellant presented no sentencing argument except argument concerning precommitment credit. As to the present offense of first degree murder, the court sentenced appellant to prison for life without the possibility of parole, plus 25 years to life for the Penal Code section 12022.53,

subdivision (d), enhancement.[13] The court, pursuant to section 654, stayed the sentence for the attempted robbery.[14] Appellant failed to object to his sentence on the ground that it constituted cruel or unusual punishment.

2. *Analysis.*

Appellant claims his sentence of life without the possibility of parole for first degree murder is cruel and unusual punishment.[15] We have set forth the facts pertinent to appellant's cruel and unusual punishment contention. We conclude appellant's sentence did not violate constitutional proscriptions against cruel or unusual punishment. (Cf. *People v. Askey* (1996) 49 Cal.App.4th 381, 387-388; *People v. Ayon* (1996) 46 Cal.App.4th 385, 396, 400; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-828; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631; *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1412-1417; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137; *People v. Reyes* (1987) 195 Cal.App.3d 957, 963; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 177.) None of the cases cited by appellant, or his argument, compels a contrary conclusion.[16]

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[13] The Penal Code section 12022.5, subdivision (a), enhancement was stayed.

[14] The court ordered the unstayed sentence in the present case to be served consecutively to a sentence imposed in case No. GA041081.

[15] Appellant's cruel and unusual punishment claim is limited to this.

[16] Because we have addressed the merits of appellant's contention that his sentence constituted cruel and unusual punishment, there is no need to decide whether he waived the issue by his failure below to object to his sentence on that ground. (See *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583*; People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Moreover, in light of our discussion, we reject appellant's claim that he was denied effective assistance of counsel; any incompetence of appellant's trial counsel by trial counsel's failure to raise a cruel and unusual punishment claim was not prejudicial. (Cf. *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P.J.

We concur:

KITCHING, J.

ALDRICH, J